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TAN SRI DATO' (DR) ROZALI ISMAIL & ORS v. CHUA LAY KIM & ORS

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: S-22 NCvC-803-07-2012]
B 21 JANUARY 2015

CIVIL PROCEDURE: *Stay of execution of judgment – Stay of execution pending appeal – Application for – Judgment entered against plaintiff in different suit amounting to RM35,087,135.06 – Judgment sum deposited with stakeholders* C *pending outcome of application for stay – Application for stay dismissed by court – Judgment sum released to legal firm and deposited into client's account – Creation of trust – Whether judgment sum became property of trust – Whether judgment sum held by firm in that capacity – Appeal subsequently allowed – Order for restitution – Whether first to fourth defendants constructive trustees of judgment sum paid by* D *plaintiff – Whether judgment sum wrongly disbursed – Whether first to fourth defendants acted in concert to cause wrongful loss to plaintiff*

CIVIL PROCEDURE: *Contempt of court – Breach of court order, abetment of – Preservation order – Dealings with judgment sum prior to service of ex-parte preservation order – Whether first to fourth defendants in contempt of court*

E

CIVIL PROCEDURE: *Appeal – Appeal to Court of Appeal – Doctrine of lis pendens – Whether an appeal to Court of Appeal a mere continuation of a High Court trial that constituted a lis pendens to protect rights of successful litigant to obtain restitution – Whether doctrine of lis pendens applicable in a claim for* F *recovery of money under a judgment sum – Whether appeal operated as a stay of execution – Courts of Judicature Act 1964, s. 73*

CIVIL PROCEDURE: *Action – Cause of action – Whether the plaintiffs had a cause of action against defendants – Whether doctrine of estoppel applied*

The plaintiffs were defendants in an action brought against them by one G George Lim (now a bankrupt) in the High Court in 2007 ('the 2007 suit'). The first defendant was the wife of the second defendant. The third defendant was a firm of an advocate and solicitors ('the firm') which represented George Lim in the 2007 suit. The fourth defendant was an advocate and solicitor and a partner in the firm. The fifth defendant acted as trustee for H George Lim under a trust deed dated 28 February 2011. On 29 November 2010, judgment was entered against the plaintiffs for the sum of RM23,413,034.65 together with the interest at 8% per annum until full payment in the 2007 suit. Aggrieved, the plaintiffs appealed against the whole judgment sum. In the meantime, the parties to the 2007 suit agreed I on an interim stay of execution. As such, the judgment sum together with the accrued interest amounting to RM34,989,978.47 was deposited with Messrs Zul Rafique & Partners as stakeholders ('the stakeholders') to be held by

them in a fixed deposit pending the outcome of the application for stay of execution. Subsequently, the Court of Appeal ('COA') refused the stay and the sum of RM35,087,135.06 ('judgment sum') was paid out by the stakeholders to the third defendants *ie*, into the firm's RHB client's account. Dissatisfied, the plaintiffs contended that their appeal against the judgment in the 2007 suit was a continuation of proceedings before the High Court and constituted a *lis pendens* which was impressed upon the judgment sum of RM35,087,135.06 which bound each of the parties. The COA allowed the plaintiffs' appeal on 7 July 2011 and set aside the judgment in the 2007 suit and directed restitution of RM35,087,135.06 and RM359,557.97 ('COA order dated 7 July 2011') paid under the 2007 suit. In consequence, the plaintiffs asserted that the COA order dated 7 July 2011 vested the plaintiffs with a right of restitution in equity to be restored to the position they stood prior to the entry of the judgment in the 2007 suit. To support their contention, the plaintiff argued that the first, second, third and fourth defendants were constructive trustees of the sum paid by the plaintiffs under the judgment of the 2007 suit and were liable to account to the plaintiffs for the judgment sum. In the alternative, the plaintiff contended that the first, second, third and fourth defendants had acted individually and jointly or in concert with each other and with George Lim in wrongfully depriving the plaintiffs of the sum paid under the judgment of the 2007 suit with the intention of causing the plaintiffs wrongful loss and for obtaining for themselves a wrongful gain and thereby unjustly enriching themselves. On 2 March 2011, the plaintiffs further obtained an *ex-parte* order ('*ex-parte* preservation order') from the Federal Court ('FC') *vide* an application for a Preservation Order ('preservation application') to prevent the disposition, dissipation or dealings with the judgment sum. However, the FC dismissed the plaintiffs' preservation application on 9 March 2011. As a result, the plaintiffs obtained leave from the FC and commenced committal proceedings against George Lim, the second defendant and the partners of the firm, including the fourth defendant. The plaintiffs alleged that George Lim had told a lie to the court in his affidavit opposing the preservation application regarding George Lim's contention that the judgment sum had been disbursed prior to the service of the *ex-parte* preservation order. The allegation against the second defendant and the partners of the firm, including the fourth defendant, was for aiding and abetting George Lim. Further, the plaintiffs alleged that the trust was not credible and was a sham. On the contrary, the alleged contemnors, including the second defendant and the fourth defendant, challenged the allegation of contempt on the ground that the judgment sum was disbursed before notice of the *ex-parte* preservation order was given. George Lim explained to the FC that the fifth defendant had disbursed the trust monies pursuant to the trust deed. To support this contention, the second defendant explained that the sum of RM31.5 million, upon being transferred from the firm's RHB account and deposited into the

A firm's client's account with Public Bank Bhd ('PBB') on 1 March 2011, had become the property of the trust and the monies were held by the firm in that capacity. On 16 November 2011, the FC set aside the plaintiffs' leave to commence committal proceedings. Except for the fifth defendant, the first until the fourth defendants raised the issue that the plaintiffs were estopped B from claiming against them because the plaintiff had pursued their claim against George Lim to the extent of making him a bankrupt. The same defendants also relied on the contempt proceedings before the FC as constituting estoppel. The issues raised by the plaintiffs for the determination of the court were *inter alia* (i) whether the plaintiffs' appeal to the COA C against the judgment in the 2007 suit was a continuation of proceedings before the present court and constituted a *lis pendens*; (ii) whether the first to fourth defendants were at all material times constructive trustees of the judgment sum and held the same for the plaintiffs; (iii) whether the first to fourth defendants had obtained a wrongful gain and thereby enriching themselves; (iv) whether the fifth defendant was liable as an accessory for D dishonestly assisting a breach of trust by the first to fourth defendants; (v) whether George Lim was entitled absolutely to the monies paid towards satisfaction of the judgment in the 2007 suit that was paid after the dismissal of applications for stay of the judgment without any qualification.

E **Held (dismissing plaintiffs' claims against all defendants with costs):**

(1) The claim against George Lim was based on a debt that arose from the COA order dated 7 July 2011 by the Court of Appeal when it reversed the High Court decision in the 2007 suit. The claim against the defendants in the instant case was based on the equitable remedies of F constructive trust and unjust enrichment. The plaintiffs were attempting to trace the funds which allegedly had gone into the hands of the defendants, *ie*, third parties, as constructive trustees and wrongdoers. Thus, the plaintiffs' present claim was based on a different cause of action from the plaintiffs' previous claim against George Lim for a debt. (paras 24 & 25)

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(2) The issues arising from the plaintiffs' present claim based on breach of constructive trust and unjust enrichment were never decided in the Federal Court. The preservation application, which was dismissed by the FC, was not regarding breach of constructive trust and unjust H enrichment by the defendants. It was regarding the issue whether a preservation order should be made pending the *inter-partes* hearing of the plaintiffs' motion for an injunction. As for the contempt proceedings, the issue before the FC was whether George Lim and the other alleged contemnors were in contempt of court when they dealt with the I judgment sum before service of the *ex-parte* preservation order. Accordingly, the defendants should not be permitted to rely on the equitable doctrine of estoppel and the plaintiffs were allowed to institute the current proceedings against the defendants. (paras 26 & 27)

(3) The doctrine of *lis pendens* applied to a claim in regard to landed property and was not applicable to a claim for personal property. Hence, it does not apply to the plaintiffs' claim in the present case which was a claim for recovery of money under a judgment sum. Furthermore, since s. 73 of the Courts of Judicature Act 1964 provided that an appeal shall not operate as a stay of execution or of proceedings, there was no basis for the doctrine of *lis pendens* to apply in the present case. (para 194)

(4) The plaintiffs had not succeeded in establishing their claim that the first to fourth defendants were holding the judgment sum as constructive trustees for the plaintiffs. At the point when the judgment sum was released by the stakeholders and paid to George Lim through the firm's RHB client's account, there was no court order for stay of execution. Thus, George Lim was entitled to the judgment sum absolutely, and could deal with the money including setting up the trust under a trust deed. The trust fund was established at the point when the sum was disbursed from the firm's RHB client's account into the firm's PBB client's account which the firm held as solicitor for the fifth defendant as trustee. (para 194)

(5) The plaintiffs did not apply to set aside the trust deed or to have it declared null and void. There was no cogent evidence adduced by the plaintiffs that the trust deed was a sham. It was only the beneficiaries under the trust deed who could make a claim on the trust fund. The plaintiffs were not the beneficiaries under the trust deed, but are strangers to it. Therefore, they have no claim whatsoever to the trust fund. (para 194)

(6) George Lim, as settlor, upon receipt of the judgment sum, was entitled to transfer and assign it to the fifth defendant, as trustee. There was no concrete and satisfactory evidence that the fifth defendant was not a genuine trustee under the trust deed. Further, at all times, the second defendant had acted on the instructions of George Lim. The court was unable to make a conclusive finding based on the suspicions of the plaintiffs that the second defendant was the architect of the scheme, and he, together with all the other defendants, had caused wrongful loss to the plaintiffs and thereby unjustly enriched themselves. (para 194)

(7) Nowhere in the evidence did the plaintiff show exactly how the first to fourth defendants were acting in concert to cause wrongful loss to the plaintiff. There was also no evidence that the fifth defendant had acted dishonestly to assist the first to fourth defendants to commit a breach of constructive trust. There could be no claim against the firm for acting in concert with the first, second and fourth defendants. The firm was not a person and was legally represented by its partners. (paras 170 & 171)

(8) Since the plaintiffs had not succeeded in establishing that the first to fourth defendants were constructive trustees of the judgment sum, it followed that the defendants were not liable for breach of the constructive trust and unjust enrichment. Accordingly, the fifth defendant was not liable as an accessory for dishonestly assisting the first to fourth defendants for the wrongful acts alleged by the plaintiffs. The plaintiffs' claim was based on flimsy grounds, relying solely on circumstantial evidence and inferences, and not on a concrete equitable basis in accordance with equitable principles. (paras 194 & 195)

(9) The plaintiffs had enforced the judgment against George Lim for recovery of the judgment sum by bankruptcy proceedings. George Lim was currently an undischarged bankrupt. The plaintiffs now had to recover the judgment sum from George Lim's estate in bankruptcy. These proceedings was clearly an afterthought by the plaintiffs when they could not recover the judgment sum from the bankrupt, George Lim. (para 194)

(10) If the plaintiff's claim was allowed, it would set a negative precedent and create uncertainty in the legal fraternity and also the commercial sector on whether a successful litigant, in the absence of a court order for a stay of execution, could proceed to enjoy the fruits of his litigation immediately. It may well lead to an abuse of the court process where any party which failed to realise a judgment sum fully by the usual execution process or by bankruptcy proceedings would boldly attempt at a second bite of the cherry by commencing proceedings similar to these proceedings, namely to ask the court to imply the creation of a fictitious constructive trust. The successful litigant, his solicitor, and any person who had been paid any moneys from the judgment sum, would then be held accountable as constructive trustees as suggested by the plaintiffs in this case. (paras 194 & 196)

Case(s) referred to:

Ambank (M) Berhad v. KB Leisure (M) Sdn Bhd [2011] 1 LNS 764 HC ***(refd)***
Banque Financiere de la Cite v. Parc (Battersea) Ltd [1998] 1 All ER 737 ***(refd)***
Bellamy v. Sabine [1857] 44 ER 842 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co [1969] 2 Ch 276 ***(refd)***
Damodaran v. Choe Kuan Him [1980] AC 497 ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***
Hong Leong Bank Bhd v. Phung Tze Thiam [2008] 4 CLJ 742 CA ***(refd)***
Hussey v. Palmer [1972] 3 All ER 744 ***(refd)***
Indian Council For Enviro-Legal Action v. Union of India [2011] 4 SCC (Civ) 87 ***(refd)***
La Roche v. Armstrong [1922] 1 KB 485 ***(refd)***
Ranbaxy (Malaysia) Sdn Bhd v. EI Du Pont Nemours & Co [2012] 9 CLJ 79 CA ***(refd)***
Re Farepak Food and Gifts [2007] 2 BCLC 1 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tong Soon Tiong & Ors v. FA Securities Sdn Bhd [2013] 2 CLJ 448 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve [2013] SGCA 36 ***(refd)***
Wigram v. Buckley [1894] 3 Ch 483 ***(refd)***
Yeoman's Row Management v. Cobbe [2008] 4 All ER 713 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Evidence Act 1950, s. 118
Rules of Court 2012, O. 34 r. 2(2)(e)(ii), O. 35

Other source(s) referred to:
Bryan A Garner, *Black's Law Dictionary*, 8th edn, p 1573
Lewin on Trusts, 18th edn, vol 2, p 92

For the plaintiffs - Gopal Sri Ram (BE Teh, CK Lim & Fadzilah Pilus with him); M/s Teh & Assocs
For the 1st, 3rd & 4th defendants - David Mathews (Prakash Lachimanan, Tina Francis & Malarvily Perumal with him); M/s Mathews Hun Lachimanan
For the 2nd defendant - Krishna Dallumah; M/s Krishna Dallumah, Manian & Indran
For the 5th defendant - Jagjit Singh Gill; M/s Putra Gill

Reported by Sandra Gabriel

JUDGMENT

Yeoh Wee Siam J:

Background Facts

[1] This is the plaintiffs' claim against the first, second, third, fourth and fifth defendants (to be referred to as D1, D2, D3, D4 and D5 respectively).

[2] The plaintiffs were defendants in an action brought against them by one Lim Pang Cheong *alias* George Lim ("George Lim") (now a bankrupt) in Kuala Lumpur High Court Civil Suit No. S-22-1108-2007 ("the 2007 suit").

[3] D1 is the wife of D2. D2 is an advocate and solicitor and a consultant to D3. D3 is a firm of advocates and solicitors ("the firm"). D4 is an advocate and solicitor and a partner in the firm/D3. The firm represented George Lim in the 2007 suit. D5 acted as trustee for George Lim under a deed of trust dated 28 February 2011 ("trust deed" or "trust") (CBOD1 Pt B pp. 10-22).

[4] On 29 November 2010, judgment was entered in the High Court against the plaintiffs in the 2007 suit for the sum of RM23,413,034.65 together with interest at 8% per annum until full payment.

[5] The plaintiffs appealed to the Court of Appeal against the whole judgment of the High Court in the 2007 suit.

[6] The parties to the 2007 suit agreed on an interim stay of execution. The judgment sum together with accrued interest amounting to RM34,989,978.47 was deposited with Messrs Zul Rafique & Partners, as

A stakeholders ("the stakeholders"), to be held by them in a fixed deposit pending the outcome of an application for stay of execution before the Court of Appeal.

[7] On 28 February 2011, the Court of Appeal refused a stay and the judgment sum of RM35,087,135.06 ("judgment sum") was paid out by the B stakeholders to D3, as solicitor of George Lim, into its RHB client's account.

[8] The plaintiffs contend that their appeal against the judgment dated 29 November 2010 in the 2007 suit was a continuation of proceedings before the High Court and constituted a *lis pendens* which was impressed upon the judgment sum of RM35,087,135.06 and which bound each of the defendants. C

[9] On 7 July 2011, the Court of Appeal allowed the plaintiffs' appeal and set aside the judgment in the 2007 suit and directed restitution of the sums of RM35,087,135.06 and RM359,557.97 paid under the judgment (CBOD1 Pt B pp. 91-92).

D **[10]** The plaintiffs assert that the order of the Court of Appeal dated 7 July 2011 vested the plaintiffs with a right of restitution in equity to be restored to the position they stood prior to the entry of the judgment dated 29 November 2010.

E **[11]** The plaintiffs contend that D1, D2, D3 and D4 are constructive trustees of the sum paid by the plaintiffs under the judgment of the High Court in the 2007 suit dated 29 November 2010 and are liable to account to the plaintiffs for the judgment sum.

[12] Further, in the alternative, the plaintiffs contend that D1, D2, D3 and F D4 acting individually or jointly or in concert with each other and/or with George Lim wrongfully deprived the plaintiffs of the sum paid under the judgment dated 29 November 2010 with the intention of causing the plaintiffs wrongful loss and/or for obtaining for themselves or others a wrongful gain and thereby unjustly enriched themselves at the expense of the plaintiffs. G

The Plaintiffs' Claim

[13] The plaintiffs' claim in prayer 14 of the statement of claim ("SOC") is as follows:

H (i) As against all the defendants, the sum of RM35,087,135.06;

(ii) Alternatively:

(a) As against D1, the sum of RM15,500;

(b) As against D3, the sum of RM11,750,000;

I (c) As against D4, the sum of RM3,500,000;

(iii) Interest on the aforesaid sums at the rate of 2% per annum on monthly rests on the footing of wilful default from 28 February 2011 until the date of full payment (ie, the prayer in the SOC as amended in the plaintiffs' written submissions dated 11 November 2014);

(iv) Costs of the action; and

(v) Such further or other relief in law or in equity as this Honourable Court deems just to mould to serve the interests of justice.

***Ex Parte* Preservation Order At The Federal Court**

[14] On 2 March 2011, the plaintiffs obtained an *ex parte* order ("the *ex parte* preservation order") *vide* Federal Court Civil Application No. 08-79-2011(W) ("the preservation application") to prevent George Lim whether by himself or by his servants or agents from disposing off or dissipating or dealing with the released sum, ie, the judgment sum, said to be in the hands of George Lim's solicitors pending the *inter partes* hearing of the plaintiffs' motion for an injunction on the same terms.

Dismissal Of The Preservation Application

[15] On 9 March 2011, the Federal Court dismissed the preservation application with costs.

Contempt Proceedings

[16] On 19 May 2011, the plaintiffs obtained leave from the Federal Court to commence committal proceedings against George Lim, D2 and the partners of the firm, including D4 (CBOD6 Pt B pp. 2012-2018).

[17] The plaintiffs alleged that George Lim had told a lie to the court in his affidavit opposing the preservation application regarding his contention that the released sum had been disbursed prior to the service of the *ex parte* preservation order. The allegation against the others, including D2 and D4, was for aiding and abetting George Lim (see para. 11 of the motion to commit at p. 2027 of CBOD6 Pt B).

[18] The alleged contemnors, including D2 and D4, challenged the allegations of contempt. The alleged contemnors contended that the released sum was disbursed before notice of the *ex parte* preservation order was given.

[19] George Lim explained to the Federal Court that he had appointed D5 as his trustee pursuant to the trust deed dated 28 February 2011 ("the trust") (CBOD1 Pt B pp. 10-22), and the trust monies were disbursed according to the trust (see paras. 21-26 at pp. 2059-2060 of CBOD6 Pt B). D2 contended that the sum of RM31.5 million, upon being transferred from the firm's RHB client's account and deposited into the firm's client's account with Public Bank Bhd ("PBB") on 1 March 2011, became the property of the trust, and the monies were held by the firm in that capacity (see paras. 30 and 31 of the affidavit affirmed by D2 on 12 October 2011 at p. 2125 of CBOD6 Pt B).

[20] The plaintiffs contended that the trust is not credible and argued at the hearing before the Federal Court that the trust deed was a sham.

[21] On 16 November 2011 the Federal Court, after considering the evidence and arguments by parties, allowed the applications filed by the alleged contemnors, *inter alia* D2 and D4 here, to set aside the leave to commence committal proceedings (see the judgment of the Federal Court dated 16 December 2011 at pp. 2485-2515 of CBOD7 Pt B).

[22] The Federal Court held, *inter alia*, that:

> [46] *It cannot be denied that upon the stakeholder's cheque for the Released Sum being cleared into the firm's RHB account, they were monies belonging to the 1st respondent. ... What is disputed is whether the Released Sum was paid out of the RHB account prior to receiving notice of the Ex Parte Preservation Order on 3.3.2011.*
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> [47] ... **The question is whether any of these releases constitutes a breach of the Ex-Parte Preservation Order.** The detail of the three tranches as they were referred to are as follows:
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> [48] ...
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> [49] ...
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> [50] ...
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> [51] ...
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> [52] *The respondents further contended that when the trust monies were paid to the Trustee, they no longer belong to the 1st respondent. And the fact that the Trustee chose to retain the Firm as its solicitors does not render the 2nd, 3rd, 4th and 5th respondents guilty of any breach of the court's order.*
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> [53] ...
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> [54] ...
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> Findings
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> [55] Thus, from the evidence before us, *it is clear that the entire Released Sums were paid out and cleared from the RHB account at the latest by 2.3.2011, that is one day prior to the service of the notice of Ex-Parte Preservation Order on the respondents. Therefore, the question of breach of the said Order does not arise*. ... (emphasis added) (see pp. 2509 to 2513 of CBOD7 Pt B).

Issues For Trial In This Court

Plaintiffs' Issues

(a) Whether the plaintiffs' appeal to the Court of Appeal *vide* Civil Appeal No. W-02-3441-2010 against the judgment dated 29 November 2010 obtained by George Lim against the plaintiffs in the 2007 suit:

  (i) Was a continuation of proceedings before this Honourable Court; and

(ii) Constituted a *lis pendens* which was impressed upon the judgment sum of RM35,087,135.06 and which bound the defendants herein.

(b) Whether D1 to D4 are and were at all material times constructive trustees of the judgment sum of RM35,087,135.06 holding the same for the plaintiffs.

(c) Whether D1 to D4 have obtained for themselves or others a wrongful gain and thereby enriched themselves at the expense of the plaintiffs and thus obliged to disgorge to the plaintiffs the sums received by each of them out of the judgment sum of RM35,087,135.06.

(d) Whether D5 is liable as an accessory for dishonestly assisting a breach of trust by D1 to D4.

Defendants' Issues

(e) Whether George Lim was entitled absolutely to the monies paid towards satisfaction of the judgment dated 29 November 2010 that was paid after the dismissal of applications for stay of the judgment and without any qualification.

(f) Whether the order of the Court of Appeal dated 7 July 2011 in Civil Appeal No. W-02-3441-2010 ordering George Lim to pay the plaintiffs the monies released towards satisfaction of the judgment and interest accrued thereon ("the restitution order") would provide the plaintiffs a right *in personam* against George Lim and not otherwise.

(g) Whether the plaintiffs have enforced the said right *in personam* by applying for and obtaining a receiving order and adjudication order pursuant to the Bankruptcy Act 1967 on 8 November 2011.

(h) Whether by the action herein, the plaintiffs are seeking undue preference over the creditors of George Lim.

Consideration And Findings

The Estoppel Point Raised By The Defendants

[23] Except for D5, the other defendants, ie, D1 to D4, raise the issue that the plaintiffs are estopped from claiming against them because they had pursued their claim against George Lim to the extent of making him a bankrupt. The same defendants also rely on the contempt proceedings before the Federal Court as constituting estoppel.

[24] I do not think that estoppel applies here. As submitted by learned counsel for the plaintiffs, the claim against George Lim was based on a debt that arose from the order of restitution decreed by the Court of Appeal when it reversed the High Court decision in the 2007 suit. The claim against the defendants in the instant case is based on the equitable remedies of constructive trust and unjust enrichment.

[25] The plaintiffs are attempting to trace the funds which allegedly had gone into the hands of the defendants, ie, third parties, as constructive trustees and wrongdoers. Thus, the plaintiffs' present claim is based on a different cause of action from the plaintiffs' previous claim against George Lim for a debt.

[26] Furthermore, the issues arising from the plaintiffs' present claim based on breach of constructive trust and unjust enrichment were never decided in the Federal Court. The preservation application, which was dismissed by the Federal Court, was not regarding breach of constructive trust, and unjust enrichment by the defendants. It was only regarding the issue whether a preservation order should be made pending the *inter partes* hearing of the plaintiffs' motion for an injunction. As for the contempt proceedings, the issue before the Federal Court was whether George Lim and the other alleged contemnors were in contempt of court when they dealt with the released sum before service of the *ex parte* preservation order.

[27] Accordingly, I hold that the defendants should not be permitted to rely on the equitable doctrine of estoppel here. The plaintiffs are allowed to institute these proceedings based on the causes of action as pleaded in the SOC.

Issue 1(i)

[28] The 2007 suit ended with the judgment of the High Court dated 29 November 2010. The plaintiffs' appeal to the Court of Appeal regarding this judgment are separate proceedings but on the same dispute and matter between the parties to the 2007 suit. Therefore, the plaintiffs' appeal to the Court of Appeal is a continuation of proceedings before the High Court.

Issue 1(ii)

[29] *Lis pendens* is a Latin phrase for "suit pending".

[30] The doctrine of *lis pendens* was developed as part of the land law in England. It is a written notice that an action has been filed which concerns the title to a real property or some interest in that real property (see definition of *Lis Pendens* at Law.Com and USLegal.Com).

[31] The plaintiffs submit that their appeal to the Court of Appeal is a mere continuation of the High Court trial and that constitutes a *lis pendens* to protect the rights of a successful appellant to obtain restitution.

[32] The plaintiffs rely on *Hong Leong Bank Bhd v. Phung Tze Thiam* [2008] 4 CLJ 742 where it was held that "an appeal to this court is merely a continuation of the trial ... so when an appeal is allowed, you have to execute or enforce that judgment in the High Court." However, I observe that nowhere in the cited case did the Court of Appeal state that an appeal constitutes a *lis pendens*.

[33] The plaintiffs further rely on *Bellamy v. Sabine* [1857] 44 ER 842 where Turner LJ said: A

> **The doctrine of *lis pendens*** is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of law and of Equity, and **rests**, as I apprehend, *upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail*. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. (emphasis added). B C

[34] The case of *Bellamy* (*supra*) was not followed by the Court of Appeal in *Wigram v. Buckley* [1894] 3 Ch 483.

[35] As submitted by learned counsel for D2, the claim here is for personal property, ie, the judgment sum, and not a claim for real property. D

[36] Regarding the application of the doctrine of *lis pendens*, in *Wigram* (*supra*) Lindley LJ, *inter alia*, stated as follows:

> The doctrine involved in this decision is very far-reaching and is of great practical importance to business men, and it requires very careful examination. For the reasons which I will state, **I am clearly of opinion that the doctrine is unsound and cannot be supported** ... E
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> If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce – e.g., bills of lading, dock warrants, wharfinger's receipts – nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. **Such a doctrine would paralyse the trade of the country**, and there is no warrant for it either in the statutes relating to *lis pendens* nor in the decisions of the Courts ... F
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> **Reliance was placed on *Bellamy v. Sabine* (1); but that was a case of real estate, and there is no ground for supporting that the observations made in that case were intended to apply to personal property** ... G
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> *Upon principle and authority I am of opinion that the doctrine in question is inapplicable to personal property other than chattel interests in land. The inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premises for arriving at such a conclusion*. (emphasis added). H

[37] In *Damodaran v. Choe Kuan Him* [1980] AC 497 the Privy Council at pp. 503-504 opined: I

> This method of protecting claims to land and to registrable interests under the Torrens Systems is wholly inconsistent with the concept of *lis pendens* as it was developed as part of the land law of England ...

A *... but neither the original common law doctrine of lis pendens nor the statutory modifications of it in England have any application to Malaysia. By section 6 of the Civil Law Ordinance 1956:*

> ... the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any
B estate, right or interest therein.

is **expressly excluded from the general reception of English common law and rules of equity as part of the law in Malaysia**. (emphasis added)

[38] From the observations of the Privy Council in *Damodaran* (*supra*), it is clear that the concept of *lis pendens* is part of English law and is wholly
C inconsistent with and hence not applicable to the Torrens system of land law in Malaysia. Thus, it can be safely concluded that the doctrine of *lis pendens* does not apply to Malaysia.

[39] Going by the guiding principles in *Wigram* (*supra*), which is a more appropriate and helpful authority, I find that the doctrine of *lis pendens* is not
D applicable in the present case as the judgment sum is personal property, and not real property.

[40] I am of the view that the plaintiffs have relied on the wrong basis, ie, *lis pendens*, to establish the claim of breach of constructive trust and unjust
E enrichment by D1 to D4, and by D5 in dishonestly assisting them.

[41] The next question that arises then is whether, without being allowed to rely on *lis pendens*, but rather on the basis that the plaintiffs' appeal to the Court of Appeal is still a continuation of the proceedings before the High Court, would the plaintiffs be able to succeed in establishing their claim
F against the defendants based on the cause of action of constructive trust and unjust enrichment.

Issue (2): Whether D1 To D4 Are Constructive Trustees Of The Judgment Sum Of RM35,087,135.06 Holding The Same For The Plaintiffs

G *Issue (3): Unjust Enrichment*

The Law On Constructive Trust

[42] The question here is whether the defendants are constructive trustees of the monies referred to in para. 11(a)-(f) of the SOC.

H **[43]** Learned counsel for the plaintiffs submits that the law on constructive trust is set out in the judgment of Suriyadi FCJ in *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949 at pp. 968-969 where he quoted the following passage in the judgment of Lord Denning in *Hussey v. Palmer* [1972] 3 All ER 744 at p. 747:

I > Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust ... By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require

it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

[44] The Federal Court went on to state as follows:

From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest. (see para. 37 of the judgment).

[45] The following two points from the above passage are to be noted:

(i) The trust may arise at the point when the trustee acquires the property for the benefit of the beneficiary;

(ii) It is an equitable remedy to provide restitution.

[46] In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 the Federal Court at para. 14 of its judgment quoted the following passage in the judgment of Edmund Davies LJ in *Carl Zeiss Stiftung v. Herbert Smith & Co* [1969] 2 Ch 276 at p. 300:

English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a *sine qua non*. Thus in *Nelson v. Larholt* [1948] 1 KB 339, it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call 'want of probity', a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trustee has been held to exist.

[47] On the other hand, learned counsel for D1, D3 and D4 submits that as can be seen from the authorities referred to in their joint submissions, the law on constructive trust is far from settled. Secondly, the concept of "justice

A and good conscience" as being the basis to impose or construct a trust which was mooted by Lord Denning in *Hussey v. Palmer* (*supra*) and referred to by the Federal Court in *Datuk M Kayveas* (*supra*) and also in *Takako Sakao* (*supra*) is no longer the preferred view.

B **[48]** He then cites the views of the learned author(s) of *Snell's Equity* (32nd edn) (tab 3 vol. 3) which are as follows:

> **At one time it was thought that a constructive trust might be used as a remedy and be 'imposed by law whenever justice and good conscience require it'**. So a son who added an extra bedroom to his house to be occupied by his mother who had paid the builder, was held to be a
C constructive trustee of the house to the extent necessary to reimburse his mother (the facts of *Hussey v. Palmer*).
>
> *More recent authorities, however, make it unlikely that this approach will be followed. The courts have affirmed that general formulae such as inequitability and the prevention of unconscionable conduct may not be used as tests for the imposition of*
D *a trust*. (emphasis added).

[49] He further relies on the recent Singaporean Court of Appeal decision in *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve* [2013] SGCA 36 which considered the position in Canada, New Zealand and Australia with regard to the concept of unconscionability and made the following observations:

E [180] ... The position is the same in Australia. The observations by Deane J in the High Court of Australia decision of *Muschinski v. Dodds* (1985) 160 CLR 583 (at 615-616), which first recognised the RCT, could not be clearer:

> F The institutional character of the trust has never completely obliterated its remedial origins even in the case of the more traditional forms of express and implied trust. This is a *fortiori* in the case of constructive trust where, as has been mentioned, the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in
> G the particular circumstances ... *The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding*
> H *of the conceptual foundation of such principles.*
>
> *Thus it is that there is no place in the law of this country for the notion of 'a constructive trust of a new model' which, '[b]y whatever name it is described, ... is ... imposed by law whenever justice and good conscience' (in the sense of 'fairness' or what 'was fair') 'require it': per Lord Denning M.R., Eves v. Eves; and Hussey v. Palmer. Under the law of this country – as,*
> I *I venture to think, under the present law of England (cf. Burns v. Burns) –proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion* (cf. *Wirth v. Wirth*), subjective views about which party 'ought to win' (cf. *Maudsley, Constructive Trusts, Northern*

Ireland Legal Quarterly, vol. 28 (1977), p. 123, esp. at pp. 123, 137, 139-140) and 'the formless void of individual moral opinion': cf. *Carly v. Farrelly*; *Avondale Printers & Stationers Ltd. v. Haggie*. *Long before John Selden's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other.* Cf. *Hepworth v. Hepworth*. *Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another.* (emphasis added).

[50] In *Re Farepak Food and Gifts* [2007] 2 BCLC 1 at p. 17 (tab 4 vol. 3) Mann J observed as follows:

> It is not just the pricking of the conscience that gives rise to the constructive trust; there is something more.

[51] Learned counsel for D1, D3 and D4 also relies on the decision of the House of Lords in *Yeoman's Row Management v. Cobbe* [2008] 4 All ER 713 (tab 5 vol. 3):

Lord Scott in his speech observed as follows:

> [16] ... To treat a 'proprietary estoppel equity' as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion. ...
>
> [17] Deane J, in *Muschinski v. Dodds* (1985) 62 ALR 429 ... said this:
>
> > The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles ... Under the law of this country – as, I venture to think under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party "ought to win" ... and the "formless void" of individual moral opinion ... ;

Further, Lord Walker observed as follows:

> [46] ... equitable estoppel is a flexible doctrine which the court can use, in appropriate circumstances, to prevent injustice cause by the vagaries and inconstancy of human nature. *But it is not a sort of joker or wild card to be used whenever the Court disapproves of the conduct of a*

A *litigant who seems to have the law on his side. Flexible though it is, the doctrine must be formulated and applied in a disciplined and principled way*. Certainty is important in property transactions. As Deane J said in the High Court of Australia in *Muschinski v. Dodds* (1985) 62 ALR 429 at p. 452:

B > Under the law of [Australia] -as, I venture to think, under the present law of England-proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion … subjective views about which party "ought to win" and "the formless void of individual moral opinion" [references omitted]. (emphasis added).

C **[52]** Learned counsel for the plaintiffs submits that *Wee Chiaw Sek Anna* (*supra*) cannot be applied here because as can be seen from para. 28 at p. 813 of the decision, the claim for restitution and constructive trust was abandoned and withdrawn by the appellants. Thus, everything else in the decision is *obiter*. Whereas in the present case, the plaintiffs are asserting
D constructive trust and unjust enrichment and not abandoning any of their heads of claim.

[53] With respect, I do not think that the paragraphs cited above from *Wee Chiaw Sek Anna* (*supra*) by learned counsel for D1, D2 and D3 are
E inapplicable. I note from para. 22 at p. 812 of *Wee Chiaw Sek Anna* (*supra*) that initially the appellant claimed in both restitution and unjust enrichment against the second respondent. The remedy sought in both claims was a remedial constructive trust ("RCT"). It was only in the oral submissions for the appeal that the appellant abandoned her claim in restitution. At para. 28 p. 813 of the same case, counsel for the appellant, Mr Kumar, conceded
F during the appeal hearing that a RCT could not be imposed without a finding of unjust enrichment. Thus, the case is still relevant regarding the issue of whether a RCT can be imposed for unjust enrichment. Moreover, the principles regarding how remedial constructive trust operates as an equitable remedy are legal principles which still remain as legal principles even if
G along the way the appellant abandoned her claim in restitution.

[54] I agree with learned counsel for the plaintiffs that this court is bound by the Federal Court decision in *Datuk M Kayveas* (*supra*), and not by the Singaporean Court of Appeal decision in *Wee Chiaw Sek Anna* (*supra*). However, where *Datuk M Kayveas* (*supra*) had been general in laying down its
H guiding principles, assistance can be sought from *Wee Chiaw Sek Anna* (*supra*), wherever appropriate, in situations where the principles have been spelt out in more specific terms. On that same note, even the principles that can be distilled from the House of Lords case in *Yeoman's Row Management* (*supra*) can be referred to by this court as a useful guide.

I **[55]** Based on the above authorities, I am of the view that the proper test to be applied in this case is whether the equitable remedy of constructive trust can be available to the plaintiffs based on applicable principles of equity

on justice and good conscience which impose a trust on the person who acquires the property to hold it for the benefit of the beneficiaries. The plaintiffs would have to establish that a constructive trust arises when the judgment sum was paid to the defendants and the defendants should hold the monies on trust for the benefit of the plaintiffs who are the beneficiaries to the trust, and not for the benefit of the defendants, or for other persons.

The Law On Unjust Enrichment

[56] Regarding the claim on unjust enrichment, the plaintiffs rely on the decision of the House of Lords in *Banque Financiere de la Cite v. Parc (Battersea) Ltd* [1998] 1 All ER 737 where in the headnotes is found the Law Lords' formulation of the three elements of a claim in unjust enrichment, namely:

> The appropriate questions to be asked in a case concerned with a restitutionary remedy were: (i) whether the defendant would be enriched at the plaintiff's expense; (ii) whether such enrichment would be unjust; and (iii) whether there were nevertheless reasons of policy for denying a remedy.

(See also *Ambank (M) Berhad v. KB Leisure (M) Sdn Bhd* [2011] 1 LNS 764; [2012] 7 MLJ 364 and Goff & Jones, *The Law of Unjust Enrichment*, 8th edn. Chp. 1).

[57] During the clarification on their written submissions on 5 December 2014, learned council for the plaintiffs further relied on the Indian Supreme Court case of *Indian Council For Enviro-Legal Action v. Union of India* [2011] 4 SCC (Civ) 87 at pp. 160-161, which is a good authority, where the law on unjust enrichment was well summed up as follows:

> 151. Unjust enrichment has been defined as:
>
> > Unjust enrichment.---A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.

See *Black's Law Dictionary*, 8th edn (Bryan A Garner) at p. 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience".

> 152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.
>
> 153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience".

A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have [it] honestly in the first instance". (*Schock v. Nash*[61], A 2d, 232-33.)

154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*[62], Lord Wright stated the principle thus: (AC p. 61)

> ... [A]ny civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

155. Lord Denning also stated in *Nelson v. Larholt*[63] as under: (KB p. 343)

> ... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires.

[58] Learned counsel for the plaintiffs submits that the proposition of law that emerges is that a constructive trust is imposed when there is unjust enrichment or want of probity. The plaintiffs had at all material times a contingent right to have their monies returned to them on the appeal being allowed. As it happened, that contingency was realised. The actings of the defendants were aimed at defeating that right by evincing an intention to cause wrongful loss. This amounts to want of probity. The defendants were unjustly enriched. Accordingly, a constructive trust arose the moment the defendants put into operation the scheme by which they, acting in concert, intentionally dissipated the monies in question with a view to defeating the plaintiffs' rights.

Plaintiffs' Case

[59] The plaintiffs' case as stated in para. 11(a) of the SOC is as follows:

> (a) On 28 February 2011, a trust deed was brought into existence under which the fifth defendant purported to act as trustee for part of the judgment sum. No monies in fact were ever held by the fifth defendant as trustee and the trust was denuded of all capital soon after it was purportedly constituted. Further, George Lim by his solicitors, Mathews, Hun, Lachimanan, in their letter dated 24 March 2011 declared that the whole of the judgment sum received by the third defendant from M/s Zul

Rafique & Partner was his to deal with absolutely. In the circumstances the said trust deed is and was a sham and pretence and brought into existence by the defendants intentionally and solely for the dominant purpose of ensuring that the plaintiffs will be unable to recover any monies in the event of their appeal succeeding.

[60] The question that arises is whether the trust deed (CBOD1 Pt B pp. 10-22) is a sham brought into existence by the defendants for the dominant purpose of ensuring that the plaintiffs would be unable to recover any monies in the event of their appeal succeeding.

[61] It must be noted that after an *inter partes* hearing, the Court of Appeal did not allow the plaintiffs' application for a stay of execution and ordered that the judgment sum be released and paid back to George Lim. The Court of Appeal did not impose any condition that George Lim should not utilise the money but must keep the money intact pending the decision of the Court of Appeal on the plaintiffs' appeal. Thus, the money belonged to George Lim at that point and he was free to deal with it absolutely.

[62] The evidence of D2 (DW1), D4 (DW2), and D5 (DW3) are somewhat similar on what happened to the released sum/the judgment sum ("judgment sum"). Their evidence can be summed up as follows (see their respective written submissions):

[63] The judgment sum was disbursed out of the firm's/D3's RHB account on 1 March 2011 and on 2 March 2011 in three tranches. The disbursements were on the specific instructions of George Lim who was entitled to the judgment sum absolutely.

Particulars

(i) On 1 March 2011, upon George Lim's instructions, a sum of RM3,500,000 was drawn out in cash by D4 (Steven How) who handed over the same to George Lim on the same day.

(ii) On 1 March 2011, a sum of RM31,500,000 was simultaneously encashed from the RHB account by D4 and transferred therefrom in cleared funds into the firm's PBB account where it was received and held on behalf of the trustee under the trust, as the trustee had appointed the firm to act for him in the matter of the trust and in particular to receive, disburse and utilise the said sum of RM31,500,000 ("trust fund") which comprised the trust fund under the trust.

(iii) On 2 March 2011, a sum of RM87,128.06 was paid out to Ms Chin Vun Hsai (Diana).

[64] The trust fund, upon being deposited into the firm's PBB account, vested in and became the property of the trust and the trustee was free to deal with the same in accordance with his powers under the trust.

[65] The trust fund was disbursed from the firm's PBB account as follows:

(i) A sum of RM7,500,000 was disbursed on 1 March 2011 towards partial settlement of the firm's professional invoice/bill dated 3 December 2010. This payment was made pursuant to item (vi) of the Third Schedule of the trust.

(ii) A sum of RM11,750,000 was disbursed on 1 March 2011 towards the subscription of shares in CHS Fire Limited ("the CHS Investment"), a company incorporated under the laws of the British Virgin Islands by way of an investment under the trust. This payment was made pursuant to item (ii) of the Third Schedule of the trust.

(iii) A sum of RM7,000,000 was disbursed on 1 March 2011 towards the purchase of 196,000 units ordinary shares of RM1 each in Dynamic Code Sdn Bhd from Pyramid Prestige Sdn Bhd held under share certificate no *013* ("the DC Investment") by way of an investment under the trust pursuant to a duly executed and stamped Share Sale Agreement dated 28 February 2011. This payment was made pursuant to item (iv) of the Third Schedule of the trust.

(iv) A further sum of RM1,000,000 was paid to secure an option to purchase further shares in Dynamic Code Sdn Bhd. This payment was made pursuant to item (iv) of the Third Schedule of the trust.

(v) The payment of the sums referred to in paras. i, ii, iii and iv above were made to D1 who was duly authorised and nominated to receive the same by the respective parties who were beneficially entitled to receive the same, notably the firm, Pyramid Prestige Sdn Bhd and CHS Fire Limited. The payments amounting to an aggregate sum of RM15,500,000 were made by the firm on the trustee's instructions out of the firm's PBB account *vide* PBB Cheque No. 284536 in the sum of RM10,000,000 and PBB Cheque No. 284537 in the sum of RM5,500,000.

(vi) A sum of RM3,250,000 was disbursed on 1 March 2011 to George Lim's offsprings who are named as beneficiaries under the trust ("Payments to Children").

Particulars Of Payments To Children

(a)	Gary Lim Thin Howe	RM1,250,000
(b)	Lisa Lim	RM1,000,000
(c)	Eugene Lim	RM1,000,000.

(vii) A sum of RM150,000 was paid to Ms Soh Siew Eng on 1 March 2011 being the person nominated and authorised by the trustee/D5 to receive fees on behalf of the trustee. This payment was made pursuant to the Fourth Schedule of the trust.

(viii) A sum of RM100,000 was paid on 2 March 2011 to Harpal Singh Grewal for services rendered. This payment was made pursuant to item (i) of the Third Schedule of the trust.

(ix) A sum of RM100,000 was paid on 2 March 2011 towards full settlement of the firm's fees due under invoice dated 3 December 2010. The payment was made to Ms Chee Vun Hsai who was the person nominated and authorised by the firm to receive the same on their behalf. This payment was made pursuant to item (i) of the Third Schedule of the trust.

(x) A sum of RM150,000 was instructed on 1 March 2011 to be paid to David Mathews of Messrs Mathews Hun Lachimanan and payment was made on 8 March 2011. This payment was made pursuant to item (i) of the Third Schedule of the trust.

(xi) A balance sum of RM6,435 in the firm's PBB account was utilised towards to the trustee's balance fees on 8 March 2011. This payment was made pursuant to the Fourth Schedule of the trust.

(xii) A sum of RM493,560 was paid on 2 March 2011 towards re-imbursement of expenses incurred by George Lim in connection with the intended purchase of preference shares in Sunbow Cash Cheras Sdn Bhd ("the Sunbow Investment"). This payment was made pursuant to item (i) of the Third Schedule of the trust.

[66] Part of the trust fund disbursed from the firm's PBB account were returned and disbursed *vide* Messrs Lai & Partners, the new solicitors for George Lim, as follows:

(i) The payments to children were returned to Messrs Lai & Partners on 25 March 2011 and 26 March 2011 and the refunded sum of RM3,250,000 were thereafter returned to George Lim *vide* CIMB cheque No. 120433 from Messrs Lai & Partners' client's account upon the request of George Lim.

(ii) The CHS Investment was subsequently aborted and the sum of RM11,750,000 paid pursuant thereto was refunded ("the CHS Refunded Monies") between 16 May 2011 and 20 May 2011 to Messrs Lai & Partners. The CHS Refunded Monies were thereafter utilised towards the Sunbow Investment whereby the trust purchased a total of 12,240 units of redeemable preference shares of RM1 each held under share certificate no *PS001* for the consideration of RM11,750,000 pursuant to duly executed and stamped Share Subscription Agreements dated 13 May 2011 and 19 May 2011 respectively.

[67] The trustee (D5) surrendered the share certificates in respect of the investments by the trust to the official assignee (now known as the Director General of Insolvency) as the trustee in bankruptcy in respect of the estate of George Lim on or about 23 March 2012.

[68] The defendants contend that the disbursements and utilisation of the monies in the trust fund were all done prior to the plaintiffs' obtaining the order from the Court of Appeal dated 7 July 2011, at which point the firm had already ceased to act for and represent George Lim. At the material time, George Lim did not have creditors and hence the creation of the trust and the disbursement of the trust funds therein were lawful and were not done with any intention to defraud creditors.

[69] The defendants further contend that the judgment sum truly and rightfully belonged to George Lim who received the same pursuant to a valid and enforceable judgment. The judgment sum was paid to the firm after the plaintiffs had failed in their attempts to obtain a stay of execution of the judgment.

Whether The Plaintiffs Have *Locus Standi*

[70] Learned counsel for D1, D3 and D4, and learned counsel for D5 respectively submit that Dr Abdul Latif bin Shaikh Mohamad (PW1), the plaintiffs' sole witness, could not prove that the judgment sum was paid by the plaintiffs.

[71] PW1 initially testified on 6 June 2014 that the first plaintiff had paid the judgment sum on behalf of the third plaintiff and it was reflected in the books of the third plaintiff. However, on 19 June 2014, PW1 said that the judgment sum was paid by a company known as Corporate Line Sdn Bhd.

[72] After PW1 was shown exh. D1, ie, the report and financial statements of the third plaintiff for the year ended 30 September 2011, PW1 changed his evidence to say that the money for the judgment sum came from another company known as Central Plus.

[73] However, later PW1 went back to his first version and said that the judgment sum came from the first plaintiff as advance. Under cross-examination, PW1 agreed that the advance was not reflected as a book debt in the accounts of the third plaintiff. PW1 also agreed that the sum of more than RM35 million was not shown in the books as owing to the first plaintiff.

[74] I agree with the submissions of D1, D3, D4, and D5 that there is no clear evidence that the judgment sum was paid by either the first plaintiff or the third plaintiff. PW1 stated that it could have been paid by some other parties ie, either Corporate Line Sdn Bhd or Central Plus.

[75] The evidence shows that the second plaintiff played no part whatsoever in the payment of the judgment sum.

[76] On the above technical point alone, it is clear that the plaintiffs have no *locus standi* to commence and maintain their claim against the defendants. However, as submitted by learned counsel for the plaintiffs, this point about the plaintiffs not having *locus standi* was never pleaded by the defendants.

I have perused the pleadings of D5, and D1, D3 and D4, and found that nowhere in their defence is this issue of *locus standi* pleaded. It is trite law that a party is bound by its pleadings. Therefore, since the lack of the plaintiffs' *locus standi* is not pleaded, the defendants are now not allowed to raise this as an issue against the plaintiffs.

Dealings With The Judgment Sum Of RM35,087,135.06

[77] As submitted by learned counsel for the plaintiffs, I do agree that the circumstances under which the judgment sum was dealt with or disbursed are rather suspicious, and the defendants appear to have acted in great haste. This is shown by the plaintiffs as follows:

(i) On 17 December 2010, D4 already knew that the fixed deposit in the hands of Zul Rafique & Partners, the stakeholders, was held in RHB, KLCC branch (NE at p. 30 and also CBOD2 Pt B pp. 333-334);

(ii) On 21 January 2011, D4 opened a client's account of the firm/D3 with RHB KLCC branch. D4's evidence is that he was informed by D2 to open this account (NE 7 October 2014 at p. 10);

(iii) In cross-examination by counsel for the plaintiffs (p. 31 NE), D4 agreed that the purpose why the firm opened the account at the very same branch was to facilitate the receipt of the monies once the stay was refused;

(iv) The stay of execution was refused on 28 February 2011. D4's evidence is that after the refusal of the stay, the cheque for the judgment sum was collected from Zul Rafique & Partners in the afternoon or evening of that very day (28 February 2011) and banked into D3's client's account with RHB, KLCC branch on the next day (1 March 2011) (NE 8 July 2014 p. 20);

(v) By 2 March 2011, RM35 million had been taken out. Part of it, ie, RM3.5 million, was taken out in physical cash (NE 20 June 2014 p. 28);

(vi) A sum of RM31.5 million was sent as cash *via* a telegraphic transfer to D3's client's account with PBB, Raja Chulan branch (CBOD1 Pt B p. 78);

(vii) From this account with PBB, on cheques signed by D4, the following payments were made:

A. on 1 March 2011

Chua Lay Kim (ie, D1)	RM5,500,000
Chua Lay Kim (ie. D1)	RM10,000,000
Kumar Jaspal Quah & Aishah (ie, D3) Client's account	RM11,750,000

A B. on 2 March 2011

Eugene Lim Ting Hian	RM1,000,000
Lisa Lim Siew Peng	RM1,000,000
Gary Lim Ting Howe	RM1,250,000

B C. The following payments were also made out of the firm's client's account with PBB, Jalan Raja Chulan branch:

Soh Siew Eng	RM150,000
Harpal Singh Grewal	RM100,000
Diana Chee Vun Hsai	RM100,000
David Thomas Mathew	RM150,000
George Lim	RM493,560

D (these cheques are at CBOD1 Part B pp. 81-90);

(ix) D1, ie, the wife of D2, was paid an aggregate sum of RM27.25 million;

(x) D1, in her further and better particulars, say:

E (a) The person beneficially entitled to the sum of RM7,500,000 is D3, the firm. There was an oral nomination and authorisation given by the D2 to receive this sum;

(b) The person beneficially entitled to the sum of RM8,000,000 is Pyramid Prestige Sdn Bhd ("Pyramid Prestige") and she was given a written nomination and authorisation by Pyramid Prestige to do so;

F

(c) The person beneficially entitled to the sum of RM11,750,000 is CHS Fire Limited ("CHS Fire"). The nomination and authorisation to receive this sum of money was in writing given by CHS Fire.

G Dissipation Of RM35,087,135.06

[78] D2 does not deny that by the morning of the 2 March 2011, the firm's PBB account had also been emptied (see NE 20 June 2014 p. 36, lines 16-19). When questioned in cross-examination as to why the hurry to clear out the monies from the PBB account, D2 replied as follows:

H

> VIJAY : My Lady, it's, this is substantial amount of money which my client has been waiting for since December. He wants to put his money to use immediately and I think he's fully entitled to so. He's not going to sit on his money. He wants to make it work for him. Interest on RM31 million per day is. (NE 20 June 2014 at p. 36 lines 32-37).

I

[79] When pressed further, D2 admitted that not all the RM35 million was paid to George Lim (NE, 20 June 2014 p. 37, lines 9-13).

[80] The question now is whether the defendants have a legal basis for the disbursements of the judgment sum, or the haste in clearing out the monies in the firm's PBB account was merely a disguise to expeditiously put the monies beyond the reach of the plaintiffs.

Physical Cash Withdrawal Of RM3,500,000 By D4 On 1 March 2011

[81] The defendants' own witness (DW5, Razali bin Hj Mohd Nor) said that based on his experience, "it is not normal ... to draw cash in millions" (NE 9 July 2014, p. 28 lines 1-14).

[82] It is D4's evidence that the RM3.5 million was taken out in cash by him at the RHB, KLCC branch on the instructions of George Lim (NE 9 July 2014 at p. 80, lines 36 and 37).

[83] However, under cross-examination by the plaintiffs' counsel, D4 (Steven How) was confronted with his previous evidence given on oath, namely an affidavit affirmed on 12 October 2011 where D4 had said that it was D2, and not George Lim, who gave him the instructions to withdraw the RM3.5 million in cash (NE 9 July 2014, pp. 91, 92 & 93).

[84] I agree with the submissions of learned counsel for the plaintiffs that D4 (Steven How), being a trained practising lawyer, would have only signed the above affidavit after reading it. He did not file a corrective affidavit. D4's oral evidence in court that he withdrew the RM3.5 million in cash on the instructions of George Lim conflicts with his affidavit statement that he withdrew the same sum on the instructions of D2.

D1's Nomination And Authorisation To Hold The Sum Of RM8,000,000 And RM11,750,000

[85] The purported written authorisation by Pyramid Prestige for D1 to be paid the sum of RM8,000,000 is at CBOD10 Pt C p. 2, now marked as ID-D2.

[86] ID-D2 was signed by Thian Mung Ching, in his capacity as Director of Finance of Pyramid Prestige. He was listed as a witness in the defendants' list of witnesses, but he was not called by the defendants to give evidence in court.

[87] The written authorisation of CHS Fire to D1 to receive monies is at CBOD10 Pt C p. 10.

[88] Both purported written authorisations by Pyramid Prestige and CHS Fire respectively are Part C documents and hence are not accepted by this court as exhibits. They ought not to be relied upon since their authenticity and contents have been expressly challenged (see the Federal Court decision in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 at p. 805, para. 34). (See also O. 34 r. 2(2)(e)(ii) of the Rules of Court 2012).

[89] The sum of RM11,750,000 was paid *via* a cheque drawn on the firm's PBB account, Jalan Raja Chulan branch in favour of D3/the firm. This cheque was paid into the firm's client's account kept at PBB, Jalan Hang Lekiu branch, and then paid out to D1 (NE 8 July 2014 p. 94 lines 15-37 and p. 95 lines 10-34).

[90] It is true that the route which the money travelled, namely from the firm's account with PBB Jalan Raja Chulan branch to the firm's account with PBB Jalan Hang Lekiu branch gives rise to suspicion as to the genuineness of the transaction. The question posed by learned counsel for the plaintiffs merits consideration ie, "why the need to move the money from the Jalan Raja Chulan branch to the Hang Lekiu branch". The plaintiffs submit that it is a fair inference that the money was routed in such a way so as to cover its tracks and the identity of the ultimate payee. In the first place, the money could easily have been paid out of the PBB account at the Jalan Raja Chulan branch to D1.

Bill Dated 3 December 2010 For RM7,600,000

[91] Of the sum of RM7,600,000, RM7,500,000 was paid out of the trust monies to D1 as authorised by D3 *via* an oral authorisation given by D2.

[92] This bill is at CBOD7 Part B p. 2545, now exh. D3.

[93] It is the plaintiffs' case that this is a false bill. D4, in his evidence, said that the sum of RM7.5 million "was supposedly paid for our legal fee" (NE 9 July 2014, p. 84 lines 25 and 26). This bill is not in the usual form used by the firm as may be seen from those other bills in the proof of debt filed by the firm (CBOD1 Part B pp. 105 and 106).

[94] The bill for RM7.6 million describes the fee as including tax. D4, under cross-examination, said the firm undertook to pay the 6% service tax and that the service tax would be paid from the RM1.6 million portion of the bill (NE 7 October 2014, pp. 20 and 21). D4 did some mental arithmetic and said the service tax to be paid would be about RM90,500.

[95] Learned counsel for the plaintiffs submits that this evidence of D4 about the payment of service tax out of the RM1,500,000 is patently false. This is because the evidence of D5, the trustee, is that the RM100,000 payment to Diana Chee Vun Hsai is the balance after payment of RM7,500,000 to D1 from the sum of RM7,600,000 (NE 7 October 2014 pp. 70 and 71).

[96] Counsel for the plaintiffs further submits that the bill for RM7.6 million is a false document created with the intention to cause wrongful loss to the plaintiffs.

Whether D1 Is Liable

[97] D1 never came to court to give evidence. Her husband, D2, testified for himself and on D1's behalf.

[98] Learned counsel for the plaintiffs cites O. 35 of the Rules of Court 2012 ("ROC") and submits that each defendant has his/her own case to conduct and close his/her case at the end of his/her evidence before the next defendant opens his/her case.

[99] In the decision of the Court of Appeal in *Ranbaxy (Malaysia) Sdn Bhd v. EI Du Pont Nemours & Co* [2012] 9 CLJ 79 Ramly JCA (as His Lordship then was), *inter alia*, stated:

> [71] There is no law to say that a party to a civil proceeding must personally attend court and give evidence to support its claim or counterclaim. The respondent may, at its own discretion call any number of witnesses whose evidence are relevant to prove its defence and counter claim. ...
>
> [...]
>
> [72] ... How the respondent decides to defend its case is a matter of its own discretion. At the end of the day, the court should assess the evidence presented by both parties in totality.

[100] In the Federal Court decision in *Tong Soon Tiong & Ors v. FA Securities Sdn Bhd* [2013] 2 CLJ 448 Suriyadi Halim Omar FCJ, *inter alia*, stated as follows:

> [3] Nothing should be inferred from the absence of the first five plaintiffs to appear in court as there is no requirement in law for them to personally testify in support of their respective claims. Peter Gillies in *Law of Evidence in Australia* 2nd edn. wrote at p. 653:
>
> > A party in civil proceedings may decline to testify, and/or adduce evidence on a particular issue, such as by failing to call a particular witness ... The approach of the courts has been that a relevant failure to call evidence or to testify in civil procedures is of evidential significance.
>
> [4] Success of any claim depends on sufficiency of the relevant and admissible evidence made available to the court which may come from various sources.

[101] Applying the above principles to the present case, it is therefore not a legal requirement for D1 to come to court and give evidence. She is allowed to rely on the evidence of D2, who is also testifying on her behalf, and the evidence of the other defendants. The plaintiffs allege that D1 is the agent and/or *alter ego* of D2, her husband. There is no reason why D1 cannot be allowed to rely on the evidence of D2. Her only disadvantage is that the plaintiffs can now claim that she was not in court to confirm or deny the evidence of D2 and the other defendants. Since D1 is relying on the evidence of the other defendants, she is therefore not required to close her case before D2 begins his case.

[102] The plaintiffs' complaint against D1 is in para. 11(b) and (e) of the SOC regarding the payment of RM15,500,000 being contrary to the object set out in the Third Schedule of the trust deed.

[103] I find that cls. (ii) and (iv) of the Third Schedule to the trust deed expressly allow the trustee/ D5 to invest in CHS Fire and Dynamic Code. The clauses provide as follows:

> (ii) To invest in CHS Fire Limited, 4th Floor, Central Tower, No. 28, Queen's Road, Central, Hong Kong (hereinafter called the "Company"), which Company is involved in property investment in the China and which the Settlor has agreed to invest for the sum of Ringgit Malaysia Eleven Million Seven Hundred and Fifty Thousand (RM11,750,000) only. The Trustee is requested to substitute the Settlor in the Agreement entered into between the Settlor and the Company;
>
> (iv) To invest up to Ringgit Malaysia Fifteen Million (RM15,000,000.00) only in Dynamic Code Sdn. Bhd. (Company No.: 518057-P), a company incorporated in Malaysia, which owns and operates importing, retailing and wholesaling of cigar and cigar related products under the brand name/ trademark "Havana Club".

[104] D1 was authorised by her husband, D2, to receive the sum of RM7,500,000 from the firm. These are for legal fees due to the firm but payable to D2 for his professional services rendered to George Lim. There is no written authorisation from D2 to D1. However, I observe that that the plaintiffs themselves have pleaded in para. 1 of their SOC (BOP p. 18) that D1 is the "wife and agent or *alter ego*" of D2. Thus, there is no reason why D1 cannot accept this sum of money on behalf of D2. Therefore, I accept D2's evidence that he had orally authorised D1, his wife, to receive such sum. This sum appears to be a valid payment by George Lim in respect of the firm's bill (CBOD7 Pt B p. 2545 or exh. D3). I shall deal with the bill later in regard to D2.

[105] The purported authorisations to D1 by Prestige Pyramid and CHS Fire are not exhibits but merely Part C documents. It is clear therefore that D1 could not prove that she was duly authorised to receive the sums from Prestige Pyramid and CHS Fire.

[106] However, I find that D1 did not gain personally from such sums. The subscription of shares in CHS Fire was aborted and the sum of RM11,750,000 was paid to Messrs Lai & Partners, ie, the new solicitors of George Lim, at the material time. The sum of RM8,000,000 was payment towards purchase of shares on Dynamic Code and these shares have been surrendered by the trustee/ D5 to the Director General of Insolvency ("DGI") (since George Lim is an undischarged bankrupt).

[107] The intended investment in CHS Fire and the purchase of Dynamic Code shares are provided in the trust (see evidence of D5 in DW3-WS(1), Q & A. 8, 9 & 10, trust deed dated 28 February 2011 (CBOD1 Pt B pp. 10-22), Subscription Agreement dated 28 February 2011 (CBOD1 Pt B pp. 44-53) and Share Sale Agreement dated 28 February 2011 (CBOD1 Pt B pp. 23-43)).

[108] I find that it is illogical and unreasonable for the plaintiffs to assert that when D1 received the respective sums of money, she was acting as constructive trustee for the plaintiffs. It appears to me to be rather fictitious to imply that a constructive trust is created the moment D1 received the money. The investments in CHS Fire and Dynamic Code are expressly allowed under the trust deed. It is clear that at the end of the day, D1 does not have in her possession the sums claimed by the plaintiffs as per the SOC. Therefore, I am satisfied that the plaintiffs have failed to make out a case against D1 for breach of constructive trust and for unjust enrichment.

Whether D2 Is Liable

[109] There is no alternative prayer in the plaintiffs' SOC regarding D2. This means that the plaintiffs are claiming the full judgment sum of RM35,087,135.06 from D2 jointly with the other defendants or severally.

[110] D2's defence is that he had at one time *via* the firm represented and acted for George Lim and D5/the trustee.

[111] D2 asserts that the judgment sum was disbursed out of the RHB account on 1 March 2011 and 2 March 2011 in three tranches on the specific instructions of George Lim who was entitled to the judgment sum absolutely. D2 gave the following particulars:

(i) On 1 March 2011, upon George Lim's instructions, a sum of RM3,500,000 was drawn out in cash by D4 who handed over the same to George Lim on the same day (CBOD6 Pt B p. 2086 on the RHB account, the witness statement of D2, the endorsement on the back of the cheque at CBOD2 Pt B p. 76 and the payment voucher marked as exh. D6E).

(ii) On 1 March 2011, a sum of RM31,500,000 was simultaneously encashed from the RHB account by D4 and transferred therefrom in cleared funds into the firm's client's account held at PBB, Jalan Raja Chulan Branch ("the PBB account") where it was received and held on behalf of the trustee/ D5 under the trust as the trustee had appointed the firm to act for him in the matter of the trust, and in particular to receive, disburse and utilise the sum of RM31,500,000 ("the trust fund") (CBOD1 Pt B pp. 77 and 78, CBOD6 Pt B p. 2086 and trust deed at CBOD1 Pt B pp. 10-22).

(iii) On 2 March 2011, a sum of RM87,128.06 was paid out to a third party ie, Ms Chee Vun Hsai (Diana).

[112] The trust fund, upon being deposited into the PBB account, vested in and became the property of the trust and the trustee/ D5 was free to deal with the same in accordance with his powers under the trust (see cl. 2.2 of trust deed at CBOD1 Pt B p. 13).

[113] As submitted by learned counsel for D2, the disbursement and utilisation of the monies in the trust fund were all done prior to the plaintiffs obtaining the order from the Court of Appeal dated 7 July 2011, at which point the firm had already ceased to act for and represent George Lim. This was the finding of the Federal Court. At that material time, George Lim did not have creditors. Therefore, the creation of the trust and the disbursement of the said trust fund therein appear to be lawful and were not done with any intention to defraud creditors.

[114] Regarding the disbursements out of the trust fund for the investments in CHS Fire and Dynamic Code, I have already dealt with them above in the case regarding D1's liability.

[115] Regarding the other disbursements out of the trust fund made by the trustee, I shall consider them later on this judgment in respect of D5's liability.

[116] I shall now consider the disbursement of RM7,500,000 on 1 March 2011 out of the trust fund towards partial payment of the firm's professional invoice/bill ("the bill") dated 3 December 2010 (CBOD7 Pt B p. 2545, exh. D3) which D2 authorised his wife, D1, to receive.

[117] Clause (vi) of the Third Schedule to the trust deed provides as follows:

> (vi) To pay legal fees amounting to Ringgit Malaysia Seven Million Five Hundred Thousand (RM7,500,000) only excluding disbursements and such further legal fees as may be incurred and approved by the Trustee.

[118] Thus, pursuant to the above cl. (vi) of the Third Schedule of the trust deed, the trustee/ D5 is empowered to pay D2 out of the trust fund the sum of RM7,500,000 to the firm/D3, and therefore to D2, for legal fees (see the bill in CBOD7 Pt B p. 2545 ie, exh. D3).

[119] The bill is dated 3 December 2010, ie, a date which is long before the disbursement of the sum of RM7,500,000 out of the trust fund on 1 March 2011. The bill is addressed to George Lim. Furthermore, there is no evidence that George Lim had ever challenged the bill. There is no cogent evidence adduced by the plaintiffs that the bill is a false bill other than a mere allegation that this bill is not in the usual form/format ("form") for D3's bills which usual form can be seen from the bills produced for proof of debt in the bankruptcy of George Lim (CBOD1 Pt B pp. 120 and 121). It must also be noted here that at all times the quantum in the bill was never challenged by the plaintiffs. D4, who is a partner in D3, confirmed that the bill was issued by the firm/ D3. Even if the form of the bill is different from the firm's usual form, since George Lim did not challenge the bill at the time when it was issued on 3 December 2010, and D4 in court has confirmed the bill to be a genuine bill of the firm, and even the DGI, who are the trustees

in bankruptcy for George Lim, did not challenge the bill, I find no good reason to reject the bill as a false document. Accordingly, I accept the bill as a genuine bill.

[120] D2 stated that he had been doing work as a solicitor for George Lim for over six years. I find that it is probable that such bill for RM7,500,000 was duly incurred for professional charges and paid by the trustee/D5 on George Lim's behalf out of the trust fund. Therefore, the plaintiffs are not justified to assert that D2 is a constructive trustee for this sum (which sum should not form part of the judgment sum), or that D2 had unjustly enriched himself with this sum.

[121] Regarding all payments out of the trust fund, I find that the plaintiffs have not adduced any evidence to dispute the fact that there is in existence a trust deed dated 28 February 2011 which is duly executed and stamped.

[122] I am of the view that on 28 February 2011, when the Court of Appeal dismissed the plaintiffs' application for stay of execution, at that point in time, George Lim was entitled to the monies which form the judgment sum and the monies were at his free disposal. It is therefore against all logic, in the light of the actual factual situation that existed then, for the plaintiffs to contend that the constructive trust arose at that time.

[123] I observe that in *Carl Zeiss Stiftung* (*supra*) the Court of Appeal affirmed the decision of Lush J in *La Roche v. Armstrong* [1922] 1 KB 485 at p. 491 where Lush J said:

> Here the solicitor has received a sum of money from his client ... I should be very loath to say that **the solicitor** ... **is bound to hold the money, not for his client, but for A whose claim is not yet established**. (emphasis added).

[124] Therefore, D2, as the solicitor for George Lim, at the point of payment being made to him out of the trust fund, was not bound to hold the payment of his own legal fees for his client, George Lim, in anticipation of the decision of the Court of Appeal regarding the plaintiffs' appeal.

[125] Regarding the bill, I do not find any satisfactory evidence adduced by the plaintiffs to prove that D2 was in fact a constructive trustee for the RM7,500,000 and that he had breached his trust as a constructive trustee, and had unjustly enriched himself with the legal fees, which sum should no longer form part of the judgment sum.

Whether D3 And D4 Are Liable

[126] D4 testified for himself and the Firm/D3. D3 and D4 contend that the judgment sum was received in cleared funds into the firm's client's account held at RHB Bank Bhd where it was received and held for and on behalf of George Lim on 1 March 2011. On 1 March 2011, upon George Lim's instruction, a sum of RM3,500,000 was drawn out in cash by D4 who handed over the sum to George Lim on the same day.

[127] On 1 March 2011, a sum of RM31,500,000 was simultaneously encashed from the RHB account by D4 and transferred therefrom and held on behalf of the trustee under the trust on the ground that the trustee had appointed the firm to act for him in the matter of the trust and to receive, disburse and utilise the sum of RM31,500,000 which comprised the trust fund ("trust fund") under the trust.

[128] Thereafter, the trust fund was disbursed from the firm's PBB account and dealt with in the manner as described in paras. 65-67 above.

[129] On 2 March 2011, a sum of RM87,128.06 was paid out to Ms Chee Vun Hsai (Diana).

[130] D3 and D4, like D2, contend that the disbursements and utilisation of the monies in the trust fund were all done prior to the plaintiffs obtaining the order from the Court of Appeal dated 7 July 2011, at which point the firm had already ceased to act for and represent George Lim. At that material time, George Lim did not have creditors and hence the creation of the trust and disbursement of the trust fund were lawful and were not done with any intention to defraud.

[131] D3 and D4 further contend that the judgment sum truly and rightfully belonged to George Lim who received the same pursuant to a valid and enforceable judgment. The judgment sum was paid to the firm after the plaintiffs failed to obtain a stay of execution of the judgment.

[132] The complaint against the firm at para. 11(c) and (e) of the SOC is that a sum of RM11,750,000 paid into the firm's PBB account is not within the object of the Third Schedule of the trust.

[133] This complaint does not appear to be founded as the sum was paid into the firm's said account for onward transmission to D1 for the CHS Fire investment which investment is permitted by the Third Schedule of the trust deed. The sum was subsequently returned by D1 to the trustee.

[134] As for D4 (Steven How), the complaint against him in para. 11(d) and (e) of the SOC is that the sum of RM3,500,000 was drawn in cash by D4 contrary to the object of the Third Schedule of the trust deed.

[135] I observe that cl. (i) of the Third Schedule to the trust deed allows the trust fund to be applied for, amongst others, the benefit of the settlor ie, George Lim. It reads as follows:

> (i) To pay or apply or allocate the Trust Fund to or for the maintenance, support or otherwise **for the benefit in any manner of the Settlor** and/or of all or any one or more of the Beneficiary(s) for the time being in existence and to pay the expenses and costs incurred by the Settlor and/or any one or more of the Beneficiary(s). (emphasis added).

[136] The RM3,500,000 is part of the trust fund. Clause (i) of the Third Schedule of the trust deed allows George, as settlor, to be allocated those funds.

[137] There is no evidence adduced by the plaintiffs to show that the RM3,500,000 was used by D4 for himself. Thus, I accept D4's evidence that he had withdrawn the sum and handed it to George Lim. Even though D4 in his affidavit had stated that he withdrew it on D2's instructions, but in court he said that he withdrew it on the instructions of George Lim, D4 maintains that the RM3,500,000 which was withdrawn in cash was handed to George Lim. I note that in George Lim's public examination as a bankrupt on 26 April 2012, George Lim admitted that he had asked Steven How/D4 to take out for him 10% of the judgment sum of RM35 million and on 1 March 2011 George Lim did receive RM3,500,000 from D4 (CBOD1 Pt B p. 126). I am therefore satisfied that D4 did not keep the RM3,500,000 for himself. If George Lim subsequently used the money for giving donations to third parties (CBOD1 Pt B p. 126), it is not D4's liability.

[138] It is hard to be convinced that D3 and D4 are constructive trustees of the judgment sum for the plaintiffs since at all times, the disbursements from the judgment sum were made prior to the time when plaintiffs' appeal was finally allowed by the Court of Appeal on 7 July 2011. It would not be possible for D3 and D4 to predict the outcome of the appeal.

[139] The bill dated 3 December 2010 was for the total amount of RM7,600,000 (CBOD7 Pt B p. 2545). Out of the RM7,600,000, the firm only benefited from the sum of RM100,000 in the bill and that was received by Ms Chee Vun Hsai (Diana), ie, D2's secretary, on behalf of the firm. The balance sum of RM7,500,000, out of the total amount of RM7,600,000 under the same bill, was received by D1, on behalf of D2, towards payment of D2's professional fee as counsel for George Lim in the 2007 suit.

[140] Apart from the firm's profit of the RM100,000 under the bill, there is no evidence that D4 did receive any other benefit.

[141] In the Singaporean Court of Appeal decision in *Wee Chiaw Sek Anna* (*supra*) it was held:

> 105. … *The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle*;
>
> 130 We have already observed that **unjust enrichment is not based on a general notion of unconscionability or unjustness**;
>
> 154 **A claim in unjust enrichment arises at the point of receipt and not at the point of knowledge**. In fact, knowledge does not even enter the picture (see above at [106], [108] and [110]). *A claim in unjust enrichment thus cannot arise subsequent to the point of receipt, nor can it arise as a result of the recipient's knowledge after receipt*. (emphasis added).

[142] Applying the same principles in the above case to the present case, since a claim in unjust enrichment arises at the point of receipt and not at the point of knowledge, it cannot be said that D3 and D4 were unjustly enriched at the point of receipt of the monies in question because at that point the plaintiffs' appeal was not allowed by the Court of Appeal yet. Similarly, this reasoning should apply in the case of D1, D2 and D5 as well.

[143] At the time when I wrote my previous judgment dated 22 February 2013 for the defendants' respective striking out applications, I was cautious in arriving at any findings regarding the merits of whether there was a breach of constructive trust, and unjust enrichment, and as to who should have benefit of the judgment sum. Now that I have heard this case in a full trial, I am in full agreement with what Arifin Zakaria CJ stated in his grounds of judgment dated 16 December 2011 (CBOD7 Pt B p. 2509) regarding the committal proceedings against George Lim, D2 and D4:

> It cannot be denied that upon the stakeholder's cheque for the released sum being cleared into the firm's RHB account, they were monies belonging to the 1st respondent.
>
> (Note: the 1st respondent refers to George Lim in those proceedings).

Whether D5 Is Liable

[144] D5 only came into the picture on 28 February 2011 when the trust deed was executed by George Lim, and D5 was appointed as trustee.

[145] D5 denies any wrongdoing as alleged by the plaintiffs. He maintains that the trust fund, upon being deposited into the PBB account, vested in and became the property of the trust and he, as trustee, was free to deal with the same in accordance with his powers under the trust deed.

[146] It is to be noted that in the SOC, there is no prayer by the plaintiffs to declare the trust deed to be null and void, or to set it aside. Thus, the trust deed, being duly executed and stamped, is a valid trust deed. That being the case, D5, as the trustee appointed by the settlor/George Lim, was fully empowered to disburse the trust fund of RM31.5 million in accordance with the terms of the trust deed.

[147] Pursuant to cl. 2.2 of the trust deed, George Lim, as settlor, upon receipt of the judgment sum, is entitled to transfer and assign it as "Scheduled Assets" to the trustee ie, D5.

[148] Clause 2.3 of the trust deed provides as follows:

> 2.3 The Settlor hereby declares that upon either the Settlor or the Solicitors receiving the Judgment Sum pursuant to the Judgment, the Trust shall come into effect immediately and shall be absolute and irrevocable.

[149] Recital [C] of the trust deed provides as follows: A

> [C] The Trustee agrees to act as trustee to hold and manage the Trust Fund for the benefit of the Beneficiary(s) (as hereinafter defined) of the Trust (as hereinafter defined) as set out in the Second Schedule subject to the terms and conditions specified hereunder and to the provisions of the Trustee Act 1949. B

[150] All the disbursements made by D5, as trustee, from the trust fund, to George Lim's children ie, George Lim Ting Howe, Eugene Lim Ting Hin and Lisa Lim Siew Peng, are in accordance with cl. (i) of the trust deed. The names of these children are stated as beneficiaries in the Second Schedule to the trust deed. C

[151] It is true, as submitted by learned counsel for D5, that the plaintiffs are not named as beneficiaries in the trust deed. Since the sum of RM31.5 million was vested with the trustee as trust money, only the beneficiaries can challenge the trustee on the disbursement of the trust fund, but not the plaintiffs. D

[152] The investment in CHS Fire was aborted. D5, as trustee, has accounted for it by showing that the CHS Fire moneys refunded by D1 have been used to purchase the Sunbow Cash Cheras shares. D5 has surrendered the share certificates to the Director General of Insolvency ("DGI"). E

[153] PW1, under cross-examination, agreed that the sum of RM20 million was invested by the trustee in Dynamic Code and Sunbow Cash Cheras. He further agreed that the RM20 million was converted to shares, which were surrendered to the DGI upon George Lim's bankruptcy. The officer from the Insolvency Department, Siti Subaikah binti Nur (DW4), has confirmed that the trustee/D5 is shareholder of 196,000 units of shares in Dynamic Code. DW4 further confirmed that the share certificates for Dynamic Code and Sunbow Cash Cheras have been in the custody of the Insolvency Department since 27 March 2012 (CBOD8 Pt B p. 2755). F

[154] I agree with the submissions of learned counsel for the D5 that since the above share certificates are now with the DGI, the trust was not denuded of all capital as alleged in the plaintiffs' SOC. PW1, under cross-examination, agreed to this. G

[155] Regarding D3's bill of RM7.6 million that was paid out of the trust fund by D5 as trustee, PW1 agreed that the bill was not challenged by George Lim, the DGI or even the plaintiffs. PW1 further agreed that the RM7.5 million was provided for under the trust deed for the payment of legal fees. PW1 also agreed that if D1 was authorised to receive the fees of RM7.5 million on behalf of D2, and nobody had challenged it, then the plaintiffs cannot complain about it now. H I

[156] PW1 also agreed that there was nothing wrong in the trustee reimbursing George Lim the sum of RM493,560 towards reimbursement of expenses incurred in the purchase of the preference shares in Sunbow Cheras Sdn Bhd, which investment is permitted under the Third Schedule of the trust deed.

[157] PW1 agreed that the sum of RM3.25 million that was paid out to George Lim's children was refunded by them and later paid by the trustee to George Lim.

[158] PW1 further agreed that George Lim was also a beneficiary under the trust and the trustee was authorised under the trust to pay him monies.

[159] What D5 contends is true, that since the plaintiffs have made George Lim a bankrupt, they should have recourse against George Lim's estate in bankruptcy, and not against D5, as trustee.

[160] I find that D5 had acted in accordance with the terms of the trust deed when he disbursed the trust fund. There is no convincing evidence that D5 has been an accessory for dishonestly assisting D1 to D4 to put the judgment sum beyond the reach of the plaintiffs.

[161] It should be stressed here that the plaintiffs only became the creditors of George Lim on 7 July 2011. By then the trust fund had already been disbursed on 1 March 2011 and 2 March 2011. Therefore, as submitted by learned counsel for D5, there could not have been any undue preference for the plaintiffs to complain about as they were not entitled to the monies disbursed by the trustee at the material time. Furthermore, the DGI in George Lim's bankruptcy did not take any action even if there was any undue preference for the plaintiffs. Even PW1 confirmed this in his cross-examination.

[162] It is also noted that the plaintiffs did not lodge any police report to complain that D5 had dishonestly assisted the other defendants to cause wrongful loss to the plaintiffs.

[163] PW1 also confirmed that despite commencing committal proceedings against certain parties, they did not do so against D5 for the same acts.

[164] It is true that D5, as a trustee, had failed to personally keep proper account of the trust fund as required by cl. 13.1 of the trust deed. However, D5 did maintain such account through his agent, D3. Thereafter, Messrs Lai & Partners took over from D3 and maintained the account of the trust deed. Clause 13.1 of the trust deed does not state that D5 must keep the account personally. If at all, D5 could have breached cl. 13.1 of the trust deed by not keeping the account personally (which I do not think so), but such breach would not make the trust or trust deed to be a sham.

[165] D5 was paid a fee of RM150,000 (through Ms Soh Siew Eng) which is permitted under the trust deed. D5 acted in accordance with the terms of the trust deed and there is no proof that he had caused wrongful loss to the plaintiffs and unjustly enriched himself with the judgment sum. There is no cogent or convincing evidence that D5 dishonestly assisted the other defendants in causing the plaintiffs wrongful loss or in unjustly enriching themselves.

Findings By The Court In Interlocutory Matters Are Subject To Findings After Full Trial

[166] Prior to the full trial, I had heard the respective applications by the defendants to strike out the plaintiffs' claim. I stress here that any findings by the court then when deciding such striking out applications are subject to the findings of the court made after full trial in regard to the merits of the case.

[167] In *Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 at pp. 904 and 905, the Court of Appeal, *inter alia*, held:

> In my judgment, a Judge may, after expressing a view in the course of an interlocutory proceeding, quite properly hear the main action and come to a conclusion diametrically opposite to that expressed at the interlocutory level ...
>
> Remarks about quality of a defence as its stands at the interlocutory stage are tentative only. Mature and detailed argument and the quality of evidence at the trial may well lead a Judge to conclude that the preliminary view that he had formed earlier requires revision. All this part of trial work.

Claim Against The Defendants For Acting In Concert

[168] Contrary to what learned counsels for the defendants submit, the plaintiffs' case is not founded on conspiracy by all the defendants against the plaintiffs. Rather, the plaintiffs' case is based on constructive trust, of which D1 to D4 were constructive trustees of the judgment sum and they had acted in concert, in breach of the trust, to cause wrongful loss to the plaintiffs and thereby enriched themselves at the expense of the plaintiffs (see para. 11 of the SOC). As against D5, the plaintiffs' claim is that he dishonestly assisted D1 to D4 in the same (see para. 14 of the SOC).

[169] There are no particulars pleaded by the plaintiffs against each of D1 to D4 regarding their respective role, each acting in concert with the other three defendants, in the whole scheme to deprive the plaintiffs of the judgment sum. Neither did the plaintiffs plead the particulars of how D5 had dishonestly assisted D1 to D4 in their respective actings against the plaintiffs.

[170] I find that nowhere in the evidence did the plaintiffs show exactly how D1 to D4 were acting in concert to bring the trust deed and trust into existence, with a common objective, to cause wrongful loss to the plaintiffs.

There is also no evidence that D5 had in fact acted dishonestly, and the manner in which he had acted, to assist D1 to D4 to commit a breach of the constructive trust.

[171] There can be no claim against the firm for acting in concert with D1, D2 and D4. The firm is not a person. It is legally represented by its partners and the partner implicated here is D4.

[172] The plaintiffs are urging this court to draw inferences of the defendants acting in concert based on circumstantial evidence. In their written reply submissions, learned counsel for the plaintiffs highlighted events which he submitted, are too coincidental and which give rise to suspicions regarding the defendants:

30. Shares Sale Agreement in respect of Dynamic Code shares (CBOD, Part B, Volume 1, pages 24 to 43)

The Vendor of the Dynamic Code shares is Pyramid Prestige. It is recited that Pyramid Prestige is the beneficial owner of 375,000 ordinary shares of Dynamic Code. This 375,000 shares are held by trustees, namely DW2 as to 350,000 shares and Thian Mung Ching holds as trustee the balance 25,000 shares. The shares sale agreement is dated 28.02.2011 and was prepared by the 3rd defendant.

30.1 The office address of the 3rd defendant is K8-6 Solaris Mont Kiara. The address of Messrs Lai & Partners is K-08-07 Solaris Mont Kiara [see NE 09.07.2014 at page 98 lines 26 to 32]. And Pyramid Prestige Sdn Bhd is located at Lot K8-8 Solaris Mont Kiara [see NE 09.07.2014 at page 99 lines 28 to 31].

30.2 The 3rd defendant, Lai & Partners and Pyramid Prestige are all coincidentally neighbours. It is also a coincidence that the 4th defendant holds the shares of Dynamic Code, as trustee for Pyramid Prestige. And coincidentally all the documents are dated 28.02.2011.

30.3 It is submitted with respect that there are simply too many unexplained coincidences, which therefore cast a serious doubt on the genuineness of these transactions.

30.4 Additionally, the primary justification for this transaction is the trust deed itself. That document being a sham, these transactions cannot stand on its own.

31. Subscription Agreement dated 28.02.2011 for subscription of shares in CHS Fire Limited

(CBOD, Part B, Volume 1 at pages 44 to 53)

The paid up share capital of CHS Fire Limited is USD1.00 only (see Schedule 1 at page 53, CBOD, Part B, Volume 1). Yet the trustee DW3 subscribed for one (1) share in CHS Fire Limited representing 50% of the total issued share capital of the company for the

substantial sum of RM11,750,000.00. The involvement of DW3 is apparent as a witness to the execution of the agreement by all three parties, namely CHS Fire Limited, DW3 the trustee and George Lim. Yet again, this agreement is dated 28.02.2011.

31.1 It is submitted with respect that no reasonable businessman will invest RM11,750,000.00 in a company having a paid up share capital of USD1.00. That fact in itself cast serious doubt on the genuineness of this transaction. Further, this transaction also relies for its justification upon the so-called trust deed. Since that document is a sham as has been amply demonstrated this transaction also cannot have a life of its own. (see Plaintiffs' Reply to Submissions of Defendants at pg 22 and 23).

[173] I have considered the plaintiffs' above reply submissions seriously. Even though the above circumstances appear to be rather coincidental and suspicious, and the defendants appear to have acted expeditiously from 28 February 2011 to 2 March 2011 in dealing with/disbursing the judgment sum, it must be borne in mind that at that point in time, there was no court order for a stay of execution. As provided by s. 73 of the Courts of Judicature Act 1964, the plaintiffs' appeal "shall not operate as a stay of execution". The plaintiffs only became entitled to the judgment sum on 7 July 2011 when the Court of Appeal allowed their appeal. Thus, it cannot be said that from 28 February 2011 to early March 2011, D1 to D4 were all acting in concert as constructive trustees, and dishonestly assisted by D5, to deprive the plaintiffs of their right to the judgment sum, or to cause the plaintiffs wrongful loss, and thus enriching themselves unjustly.

[174] For such serious allegations made against the defendants for lack of probity, and dishonestly depriving the plaintiffs of money or causing wrongful loss, and unjust enrichment, the court requires concrete evidence, and not circumstantial evidence, to be produced.

[175] Notwithstanding the above, if at the material time, ie, from 28 February 2011 to 2 March 2011, the plaintiffs were not entitled to the judgment sum yet since their appeal had not been heard and decided by the Court of Appeal, then no matter how suspiciously the plaintiffs now view the respective defendants' dealings with the judgment sum or the disbursements from the trust fund, the fact remains that at that point George Lim was entitled to the judgment sum absolutely and he was free to deal with it. Thus, I am not convinced that I should draw any adverse inference against D1, D2, D3 and D4, that they were acting in concert against the plaintiffs, and were dishonestly assisted by D5 as an accessory.

Whether The Trust Deed/Trust Is A Sham

[176] The plaintiffs contend that the trust set up by George Lim, using D5 as trustee, is a sham.

[177] Learned counsel for D2 relies on *Lewin on Trusts*, 18th edn. (tab B of D2's BOA vol. 2) which at p. 92 states that for a trust to be a sham it must be shown that there is an intention not to create a trust, but instead to give a false impression to third parties and ultimately the court.

[178] According to *Lewin on Trusts*, when deciding whether a trust is a sham or otherwise:

(a) There must be an intention not to give effect to the trust (para. 4.19 at pp. 92-93);

(b) "In addition to the intention not to give effect to the trusts, the authorities require an intent to give a false impression (para. 4.20 at p. 93);

(c) "It is difficult to establish the necessary intent, '[b]ecause a finding of sham carries with it a finding of dishonesty ... and because the court places great weight on the existence and provisions of a formal signed document" (para. 4.20 at p. 93);

(d) "For a transaction to be genuine, it is sufficient that the parties intended it to be given effect in the form in which it is recorded, and the courts will inquire into their motives for so intending ... If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it" (para. 4.21 at p. 94);

(e) 'So long as the trusts are intended to take effect according to their terms, the retention of large powers or weighty influence by a settlor does not itself make trusts void as a sham ... If the settlor retains power to direct investments, that does not make trusts a sham ...

Even if the settlor retains practical control of the whole administration of the trust through informal, personal influence over the trustees, that does not enable his creditors to "pierce the veil of the trust"[18]. ... Creditors cannot, however, pierce the veil of a trust, which is not a legal entity, in that way, even though the settlor has practical control of the trust and is using it as a vehicle into which he has placed his assets so as to be able to use them at will without his creditors being able to get them. Nor, on the authorities as they stand, can the creditors rely on any remedial constructive trust (para. 4.25 at pp. 96-97) ...

[179] Further, *Lewin On Trusts* regarding "The effect of finding a sham" states:

> The effect of a trust being held to be ineffective as a sham is that third parties can treat the trust property as still belonging to the settlor or the settlor's estate. Third parties who wish to do so might include the settlor's creditors, such as revenue authorities or trustee in bankruptcy, or estranged spouse or civil partner ... , creditors or others ... (pg 95-96).

[180] After having evaluated the evidence, and based on the principles in *Lewin On Trusts*, I find that George Lim, as settlor, had the intention to give effect to the trust. That was why he appointed D5 as trustee and provided in the trust deed the various powers for the trustee, including the power to make payments and investments. Even if George Lim retains practical control of D5, as trustee, so that he himself is able to use his assets in the trust fund without his creditors being able to get at them, it does not make the trust deed/trust a sham.

[181] Since there is no action taken by the plaintiffs to declare the trust deed to be null and void, and the DGI, being the trustee in bankruptcy of George Lim, also did not deem it fit to challenge the trust deed, I accept the trust deed, it being duly executed and stamped, as a genuine trust deed/trust and not a sham. That being the case, only the beneficiaries, can make a claim on the trust fund, but not the plaintiffs who are but creditors and strangers to the trust. It follows that the plaintiffs have no basis to claim for remedial constructive trust.

Position Of The Plaintiffs' Claim Vis-à-vis Their Claim Against George Lim

[182] George Lim has been adjudged a bankrupt pursuant to the bankruptcy proceedings commenced by the plaintiffs in respect of the debt owed to the plaintiffs under the judgment sum and a further sum of RM359,557.97 for interest thereon (see adjudicating and receiving orders dated 8 November 2011 in CBOD1 Pt B pp. 94-98).

[183] George Lim has been found by John O'Hara J in the Kuala Lumpur High Court to be mentally disordered. The matter is now pending appeal to the Federal Court.

[184] The plaintiffs, in para. 11 of the SOC, have pleaded that D1 to D4 acted in concert with each other and/or with George Lim. However, the plaintiffs did not name George Lim as a party to this action.

[185] Learned counsel for the plaintiffs submits that the defendants failed to produce George Lim as a witness. Thus, any evidence that any of the defendants had acted on the instructions of George Lim is hearsay evidence and cannot be admissible.

[186] The question now is whose burden of proof is it to produce George Lim as a witness. As rightly pointed out by learned counsel for the plaintiffs, even a mentally disordered person is a competent witness under s. 118 of the Evidence Act 1950 unless such person is prevented by his condition from understanding the questions put to him and giving rational answers to them. There is however no evidence before me as to the seriousness of George Lim's current status of his mental disorder and whether he would be able to understand questions put to him in court.

[187] Notwithstanding that, based on the plaintiffs' plea in para. 11 of their SOC (BOP p. 20), the burden of proof is on the plaintiffs to prove that the defendants acted and/or with George Lim to wrongfully deprive the plaintiffs of the judgment sum. The plaintiffs decided not to call George Lim as a witness in order to discharge this burden of proof.

[188] As for the defendants, they too decided not to call George Lim as a witness. However, D2, D3, D4 and D5 were able to prove through other supporting documentary evidence of their instructions from, or dealings with George Lim. This can be seen in the following instances:

(a) The bill (CBOD1 Pt B p. 2545 ie, exh. D3) was produced. It was confirmed by D2 and D4 to have been issued by D3 to George Lim. Payment was made on behalf of George Lim from the trust fund by D5 as trustee, and this was confirmed by D5;

(b) The trust deed, which was duly executed and stamped, was produced. D5, as trustee, gave evidence on the various payments made out of the trust fund according to the terms in the trust deed (CBOD1 Pt B pp. 11-18);

(c) The records of George Lim's public examination, as a bankrupt, dated 26 April 2012 (CBOD1 Pt B pp. 122-131 at pp. 125-126) confirm that George Lim admitted to having received the RM35 million and then instructing Steven How (D4) to appoint D5 as trustee for him. The same records also show that George Lim did instruct D4 to withdraw cash of RM3,500,000 out of the trust fund and the sum was given by D4 to George Lim; and

(d) The share certificates from the investments made by D5 in Dynamic Code and Sunbow Cash Cheras (CBOD8 Pt B p. 2755), which D5 had given to the DGI, have been confirmed by DW4, the officer from the DGI's office.

[189] I observe further that the evidence of the defendants themselves corroborate each other.

[190] Despite George Lim not being called as a witness, I am of the view that the evidence of the defendants, including the above evidence, can be accepted by this court, and they ought not be rejected as hearsay evidence.

[191] After considering the evidence in totality, I am not satisfied that there was automatically and retrospectively established a constructive trust on 28 February 2011, with D1 to D4 as its trustees for the judgment sum, when the judgment sum was ordered to be released to George Lim by the Court of Appeal (when it refused on 28 February 2011 a stay of execution pending the plaintiffs' appeal). Therefore, there can be no breach of constructive trust by D1 to D4, and accordingly by D5 in dishonestly assisting them as an accessory.

[192] Unfortunately for the plaintiffs, they are now left with whatever sum they can recover from George Lim's estate in bankruptcy.

[193] The above considerations would answer the questions or issues raised by the defendants.

Conclusion

[194] In conclusion, I summarise my main findings as follows:

(a) The doctrine of *lis pendens* applies to a claim in regard to landed property in England. It is not applicable to a claim for personal property. Hence, it does not apply to the plaintiffs' claim in the present case which is a claim for recovery of money under the judgment sum. Furthermore, since s. 73 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution or of proceedings, there is no basis for the doctrine of *lis pendens* to apply in this case.

(b) The plaintiffs have not succeeded in establishing their claim that D1 to D4 were holding the judgment sum or part thereof as constructive trustees for the plaintiffs with effect from 28 February 2011 (when the Court of Appeal refused the plaintiffs' application for a stay of execution pending the plaintiffs' appeal) until 7 July 2011 (when the Court of Appeal allowed the plaintiffs' appeal).

(c) At the point when the judgment sum was released by the stakeholders on 28 February 2011 and paid to George Lim through D3's RHB client's account, there was no court order for stay of execution. Thus, George Lim was entitled to the judgment sum absolutely, and he could deal with the money as he so wished, including setting up the trust under the trust deed. The trust fund was established at the point when the sum was disbursed from D3's RHB client's account into D3's PBB client's account which PBB account D3 held as solicitor for D5 as trustee.

(d) The plaintiffs did not apply to set aside the trust deed or to have it declared null and void. There is no cogent evidence adduced by the plaintiffs that the trust deed is a sham. By the fact that the trust deed was properly executed and stamped, the court is unable to, by mere suspicions and coincidental incidents raised by the plaintiffs, make a finding that the trust deed is a sham. It is only the beneficiaries under the trust deed who can make a claim on the trust fund. The plaintiffs are not the beneficiaries under the trust deed, but are strangers to it. Therefore, they have no claim whatsoever to the trust fund.

(e) Pursuant to cl. 2.2 of the trust deed, George Lim, as settlor, upon receipt of the judgment sum, is entitled to transfer and assign it as scheduled assets to D5, as trustee.

(f) Pursuant to cl. 2.3 of the trust deed, upon the settlor or his solicitors receiving the judgment sum, the trust shall come into effect immediately, and shall be absolute and irrevocable.

(g) All the payments made by D5 out of the scheduled assets of the trust fund are in accordance with the terms of the trust deed, as provided in the Third and Fourth Schedules to the trust deed. This would include payments to D2, D3 and D5. There is no evidence adduced by the plaintiffs that D5 is not a genuine trustee under the duly executed trust deed.

(h) At all times, D2 had acted on the instructions of George Lim. There is no concrete and satisfactory evidence, and therefore the court is unable to make a conclusive finding based on the suspicions of the plaintiffs, that D2 is the architect of the scheme, and he, together with all the other defendants, had caused wrongful loss to the plaintiffs, and thereby unjustly enriched themselves.

(i) D2's entitlement to his legal fees for work done for George Lim as contained in D3's bill was paid to D1, as D2's wife, upon authorisation by D2.

(j) D1 no longer holds any money for the purported investments in CHS Fire and Dynamic Code. The sum of RM11,750,000 was paid to Messrs Lai & Partners, the solicitors for George Lim. The sum of RM8,000,000 for the purchase of shares in Dynamic Code has been given to D5.

(k) D5, as trustee, has surrendered the share certificates for the RM20 million investment in shares in Dynamic Code and Sunbow Cash Cheras to the DGI upon George Lim's bankruptcy. Thus, it is not true that the trust fund was denuded of all capital.

(l) The plaintiffs have enforced the judgment against George Lim for recovery of the judgment sum by bankruptcy proceedings. George Lim is currently an undischarged bankrupt. The plaintiffs now have to recover the judgment sum from George Lim's estate in bankruptcy.

(m) These proceedings are clearly an afterthought by the plaintiffs when they could not recover the judgment sum from the bankrupt, George Lim.

(n) Since the plaintiffs have not succeeded in establishing that the D1 to D4 are constructive trustees of the judgment sum, it follows that the defendants are not liable for breach of the constructive trust, and unjust enrichment. Accordingly, D5 is not liable as an accessory for dishonestly assisting D1 to D4 for the wrongful acts alleged by the plaintiffs.

[195] The plaintiffs' claim is based on flimsy grounds, relying solely on circumstantial evidence and inferences, and not on a concrete equitable basis, in accordance with equitable principles. It is unprecedented.

[196] If this claim is allowed, it would set a negative precedent and create uncertainty in the legal fraternity and also the commercial sector on whether a successful litigant, in the absence of a court order for a stay of execution, can proceed to enjoy the fruits of his litigation immediately. It may well lead to abuse of the court process where any party which fails to realise a judgment sum fully by the usual execution process or by bankruptcy proceedings would boldly attempt at a second bite of the cherry by commencing proceedings similar to these proceedings, namely to ask the court to imply the creation of a fictitious constructive trust. The successful litigant and his solicitor, and any person who has been paid any moneys from the judgment sum, would then be held accountable as constructive trustees as suggested by the plaintiffs in this case.

Decision

[197] Based on the foregoing considerations, on a balance of probabilities, the court finds that the plaintiffs have failed to prove their claim against each of the defendants. Accordingly, the plaintiffs' claim is dismissed. Costs of RM30,000 are to be paid to each set of defendants, namely (1) D2, (2) D1, D3 and D4, and (3) D5.